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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Petitioner,

v.

THE UNITED STATES OF AMERICA;
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY;
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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January 17, 1992

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QUESTIONS PRESENTED

1. Whether the twelve-year statute of limitations of the Quiet Title Act, 28 U.S.C. § 2409a (1988), bars any quiet title action against the United States if it claimed "some interest" in real property more than twelve years before the action was filed.

2. Whether the statute of limitations of the Quiet Title Act bars a quiet title action against the United States to obtain an interpretation of a restriction placed on land use more than twelve years earlier, if a court concludes, without regard to applicable real property law and without discovery or an evidentiary proceeding, that the restriction is clear.

3. Whether, when a court's subject matter jurisdiction is inextricably intertwined with the merits of an action, it may dismiss without first holding an evidentiary hearing or permitting the plaintiff an opportunity for discovery.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

The parent company of petitioner Richmond, Fredericksburg & Potomac Railroad Company is RF&P Corporation. RF&P Corporation is a subsidiary of System Holdings, Inc., a corporation wholly owned by Virginia Retirement System, a state pension fund and political subdivision of the Commonwealth of Virginia. Richmond, Fredericksburg & Potomac Railroad Company has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Richmond, Fredericksburg & Potomac Railroad Company ("RF&P") respectfully prays that a writ of certiorari issue to review a September 19, 1991 judgment of the United States Court of Appeals for the Fourth Circuit. The judgment affirmed the dismissal for lack of subject matter jurisdiction of an action brought by RF&P against the United States concerning the meaning and current applicability of a land use restriction in a 1938 property agreement between them. The court held that RF&P's quiet title action was time-barred under the twelve-year statute of limitations of the Quiet Title Act, 28 U.S.C. § 2409a(g) (1988). Petitioner challenges this decision, rendered without any opportunity for discovery and without consideration of real property law or

evidence bearing on the meaning of the instrument, as an improper interpretation of the statute of limitations of the Quiet Title Act and as inconsistent with authority from other circuit courts of appeals.

OPINIONS AND ORDERS BELOW

The opinion of the Fourth Circuit is reported at 945 F.2d 765, and reproduced in the Appendix ("App.") at 1a-9a. The unreported order of that court denying a Petition for Rehearing is reproduced in the Appendix at 13a. The unreported order of the United States District Court for the Eastern District of Virginia, Alexandria Division, dismissing petitioner's quiet title action, is reproduced in the Appendix at 10a. A transcript of the district court's ruling from the bench is reproduced in the Appendix at 11a-12a.

JURISDICTION

The judgment of the Fourth Circuit was entered on September 19, 1991. App. at 1a. That court denied the Petition for Rehearing on October 9, 1991. App. at 13a. On January 3, 1992, Chief Justice Rehnquist issued an order extending the filing date of this petition to January 17, 1992. App. at 14a. This petition is being filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(f) (1988) provides:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

Section 2409a of the Quiet Title Act, 28 U.S.C. § 2409a, provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to ad-

judicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights . . . .

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

STATEMENT OF THE CASE

This case arises from a 1938 property agreement (the "1938 Indenture") between RF&P and the United States. The 1938 Indenture was intended to resolve a title dispute to land on the Virginia shore of the Potomac River, including property on which portions of the George Washington Parkway, National Airport, and RF&P's Potomac Yard and main line tracks are now located. At issue is the proper construction of terms of the 1938 Indenture concerning RF&P's use of 36 acres of that property.

In 1932, the United States brought suit against RF&P and others to quiet title to real property in the Roaches Run area on the west bank of the Potomac River. The United States claimed fee simple title to this property, including a portion of RF&P's main line railroad track from Washington to Richmond, alleging that it was below the high tide line of the Potomac River in 1791, when Maryland and Virginia had ceded land for the District of Columbia.

Negotiations to settle this dispute soon began between the National Capital Park and Planning Commission, on behalf of the United States, and RF&P. In 1933, the Commission and RF&P reached a draft agreement of settlement, subject to statutory authorization. The draft agreement provided that RF&P would convey or quitclaim title or rights in nine parcels of real property to

the United States, while the United States would quitclaim its interest in eight parcels to RF&P, subject to restrictions and covenants. The largest area, nearly forty acres at the western end of the cove of Four Mile Run, denominated Area 3, was to be quitclaimed by the United States to RF&P " 'for railroad purposes only' . . . for main line and freight yard across Four Mile Run."

The necessary statutory authorization was obtained in 1934, and the Justice Department began work on a formal conveyance instrument to carry out the terms of the 1933 draft. In late 1935, the principal Justice Department lawyer on the matter, apparently recognizing existing property law doctrines, wrote RF&P's lawyers that terms of the draft agreement providing that various tracts, including Area 3, be conveyed to RF&P for railroad purposes only "cannot be made effective if the conveyance is to be a quitclaim merely." He suggested that the United States convey these areas "for the purposes stated and upon condition that if the lands are applied to any other than railroad uses they should revert." "A quitclaim," he wrote, "would effectively transfer all the Government's title to the railroad but it would not, I think, bind the land to the restricted purpose contemplated by the parties."

In the completed Indenture, the United States quitclaimed a right-of-way or easement for railroad purposes on all but one of these areas, with a reverter (or grant over) should railroad use cease. The exception was Area 3. The United States quitclaimed all its interest in Area 3 to RF&P "to be used . . . solely for the construction, maintenance and operation of its main line railroad tracks and ways and a freight yard in connection therewith." RF&P entered into a covenant that "it will not use . . . Area 3 for any other purpose . . . ." [1]

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[1] RF&P further covenanted that it would begin filling Area 3, much of which was then marsh or under water, only at its eastern edge and, in order to permit planting by the United States on areas

For more than fifty years, RF&P was treated as the full fee simple owner of Area 3. In 1939, as part of the construction of Washington National Airport, the United States condemned a portion of Area 3 and other RF&P land and moved Mount Vernon Memorial Highway onto this land. RF&P expanded its large freight facility, Potomac Yard, onto the remainder of Area 3, and has operated this yard and its main line track there ever since. In 1975 and 1977, the Washington Metropolitan Area Transit Authority purchased portions of Area 3 adjacent to the relocated Highway (which had become part of the George Washington Parkway) for its Metro tracks. In 1987, the Virginia Department of Transportation condemned a portion of the western edge of Area 3 for the widening and improvement of Route 1. In 1989, the National Park Service purchased land, including a portion of Area 3, from RF&P for a maintenance facility and warehouse.[2]

Not until 1990 did the United States assert that the 1938 Indenture restricted the use of Area 3 or otherwise afforded the Government any control over it. At the time, the General Services Administration was considering a site including Area 3 for offices for Navy Department personnel. The National Park Service wrote GSA that it "owns restrictive easements . . . which are intended to protect the parkway [and] only allow the property to be used for railroad purposes." The Park Service also asserted that it had the right to control development on Area 3 by virtue of the 1938 Indenture.

Shortly thereafter, in August 1990, RF&P filed this quiet title action against the United States in the district court for the Eastern District of Virginia (Alexandria

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adjacent to it, would complete the eastern portion of the fill and not fill the remainder before the planting was completed.

[2] The United States conducted a title search and prepared the deed for this transaction. Significantly, the deed made no mention of the 1938 Indenture as a source of RF&P's title or as restricting its use of the land.

Division) under the Quiet Title Act, 28 U.S.C. § 2409a.[3] In its complaint, RF&P sought a declaration that it had satisfied the 1938 restrictions by expanding its freight yard on fill in Area 3 or by operating its main line tracks and freight yard there for more than fifty years. Alternatively, RF&P sought a declaration that the requirements of the 1938 Indenture would remain satisfied so long as a portion of Area 3 is used for railroad purposes.[4]

The United States moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The Government argued that the action was time-barred by the twelve-year statute of limitations of the Quiet Title Act, 28 U.S.C. § 2409a(g).

On November 2, 1990, the district court granted the motion without holding an evidentiary hearing or permitting RF&P any opportunity for discovery. Ruling from the bench, the court concluded that "more than 12 years ago clearly and unambiguously the RF&P knew what the restriction on this land was." App. at 11a. For this reason, the court ruled that any evidence other than the restriction itself was irrelevant. App. at 11a-12a.

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[3] The district court's jurisdiction was founded on 28 U.S.C. § 1346(f). RF&P's complaint also named the Metropolitan Washington Airports Authority and Washington Metropolitan Area Transit Authority as defendants, since they were possible beneficiaries of RF&P's covenant concerning Area 3, which runs with land owned by the United States in 1938.

[4] At the same time, RF&P filed an action in the Claims Court seeking money damages against the United States for breach of the 1938 Indenture. In May 1991, RF&P amended its complaint in the Claims Court action to allege a taking and to seek compensation under the Tucker Act, 28 U.S.C. § 1491 (1988). This action is currently in discovery.

The practice of the Claims Court is to defer to the judgment of a district court on title issues. *See Oak Forest, Inc. v. United States*, 23 Cl. Ct. 90, 98 (1991). If dismissal of the quiet title action were reversed, the Claims Court action presumably would be suspended until the district court addressed the title issue.

On September 19, 1991, the Fourth Circuit affirmed the dismissal. It agreed that the Indenture restriction is clear and unambiguous. App. at 8a. Without citation or analysis, the court asserted that covenants that run with the land "are not temporary unless they provide for conditions of termination or expiration." App. at 8a. The court went on to hold that, even if the provision was ambiguous, RF&P's action was still time-barred:

> Assuming *arguendo* that RF&P did not know the exact nature of the government's claim in 1938, it still could not escape the limitations bar, for all that is necessary for accrual is "a reasonable awareness that the Government claims *some interest* adverse to the plaintiff's."

App. at 9a. Finally, although RF&P had no opportunity for discovery and no evidentiary hearing had been held, the court of appeals stated that "there is no evidence that the government has ever extinguished or relaxed the use restriction, or abandoned its claim to the continued power of restriction over Area 3." The court concluded:

> To hold that the limitations period did not begin to run until conditions had changed and the government reasserted its claim would be in effect to extend the limitations period indefinitely, in contravention of Congress's expressed intent.

App. at 9a.

On October 3, 1991, RF&P filed a petition for rehearing, contending that the court's opinion ignored Fourth Circuit precedent requiring that jurisdictional challenges intertwined with the merits of an action should be determined with the merits and that the opinion ignored applicable real property law establishing that restrictions for railroad use are not permanent. The Fourth Circuit denied the petition without opinion on October 9, 1991. App. at 13a.

REASONS FOR GRANTING THE WRIT

At issue in this case is the meaning of the Quiet Title Act's requirement that a plaintiff bring suit within twelve years of "the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). If allowed to stand, the decision below will effectively bar all quiet title actions against the United States twelve years after a conveyance of an interest in real property occurs. This will make it precarious for private parties to deal with the Government, especially when partial or terminable interests in land are involved, and discourage the gift or sale of property rights to the United States. It will, in practical effect, create a new body of real property law for the Federal Government, under which normal doctrines are inapplicable, and the controlling rule will be that an instrument means whatever the Government says, so long as twelve years have passed since it was signed.

Under the ruling below, a plaintiff "should have known" that a later claim by the United States would ignore the real property law applicable to a restriction and the facts surrounding its negotiation. For this purpose, according to the decision below, a court may construe a restriction without any of the normal aids to construction—consideration of the instrument as a whole, evidence of intent, or even established doctrines of law known to the parties. Indeed, according to the court of appeals, the merits of the case are irrelevant; the statute of limitations bars any quiet title action whenever the United States had "some interest" in property more than twelve years before suit was filed, no matter what interest the Government then asserts.

This holding conflicts with decisions of three other circuit courts of appeals. The Third Circuit expressly rejected the argument that a quiet title action is barred when the United States claimed "some interest" in property more than twelve years earlier in *Deakyne v. Department of Army Corps of Eng'rs*, 701 F.2d 271, 274

(3d Cir.), *cert. denied*, 464 U.S. 818 (1983). The Ninth Circuit necessarily rejected this argument in *Shultz v. Department of Army*, 886 F.2d 1157, 1161 (9th Cir. 1989), when it held that a quiet title action is not "forever barred" twelve years after "the government has once asserted a claim to property." And the Tenth Circuit implicitly rejected it in *Poverty Flats Land & Cattle Co. v. United States*, 706 F.2d 1078, 1079 (10th Cir 1983), *appeal after remand*, 788 F.2d 676 (10th Cir. 1986), when it held that "a dispute over the meaning of language" in a conveyance to the United States is not time-barred because the conveyance occurred more than twelve years before.

I. THE FOURTH CIRCUIT'S INTERPRETATION OF THE STATUTE OF LIMITATIONS CONFLICTS WITH THE LAW IN OTHER CIRCUITS AND IS UNSOUND

RF&P's quiet title action did not challenge the validity of the 1938 Indenture. Rather, it sought a judicial declaration of the meaning and current applicability of the provisions concerning Area 3. The Fourth Circuit ruled that, even if RF&P did not know "the exact nature of the government's claim in 1938," its quiet title action was still time-barred. The court of appeals held that "all that is necessary for accrual is 'a reasonable awareness that the Government claims *some interest* adverse to the plaintiff's.'" App. at 9a (quoting *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980)) (emphasis added by Fourth Circuit).

This holding is in direct conflict with the decision of the Third Circuit in *Deakyne v. Department of Army Corps of Eng'rs*, 701 F.2d 271. In that case, the Government argued that because the plaintiff's predecessor in interest knew the United States "claimed *some* interest in the land, the district court was without jurisdiction to adjudicate the United States' interest—be it a claim to the fee or merely to an easement." *Id.* at 274. The court of appeals

rejected this argument, "agree[ing] with the district court's analysis" of it. *Id.* The district court had refused to accept the Government's "somewhat novel theory" that "if the United States claims any interest in a tract of land, however limited or undisputed, the fee owner must bring an action within twelve years or be forever barred." *Deakyne v. Department of Army*, 530 F. Supp. 1322, 1325 (D. Del. 1982), *aff'd in part and vacated in part*, 701 F.2d 271 (3d Cir.), *cert. denied*, 464 U.S. 818 (1983). The district court recognized that "it does not follow that knowledge of a claim of ownership can or must be imputed from knowledge of any claim at all." *Id.* at 1326.

The Ninth Circuit has also implicitly rejected the proposition that, if the United States claimed "some interest" in real property more than twelve years before a quiet title action is brought, the action is time-barred. In *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989), the issue was whether the plaintiff had been put on notice of the Government's claim more than twelve years before he filed a quiet title suit. The Ninth Circuit remanded, holding that there was a material issue of fact about whether the plaintiff should have known from the Government's actions at that time that the Government claimed ownership of a road. *Id.* at 1161. In its opinion, the court of appeals stated:

> The statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred.

Id.

The Tenth Circuit itself limited the reach of the "some interest" test in *Poverty Flats Land & Cattle Co. v. United States*, 706 F.2d 1078. More than twelve years before a quiet title action was brought, the United States had transferred property subject to a reservation of mineral rights.

Less than a year before suit was filed, a lessee of the United States began taking dirt, rock, and caliche from the land. The Government claimed that the suit was time-barred because these were minerals within the scope of the reservation. The court of appeals reversed a grant of summary judgment for the United States:

> The district court's ruling on the basis of the statute of limitations appears to assume that the reference in the patent gave notice to Poverty Flats and its predecessor that dirt, rock, and caliche might be claimed under the reservation. Given the unsettled state of the law, we believe that a material issue of fact exists as to whether the plaintiff knew or should have known of the claim of the United States to dirt, rock, and caliche at the time the mineral reservation was executed.

Id. at 1080. While the action would have been time-barred if Poverty Flats were seeking a declaration that the reservation was invalid, that was not its claim. Poverty Flats was "not contesting the government's right to 'mineral deposits' within the terms of the deed," the court stated. *Id.* at 1079.

> Rather, this is a dispute over the meaning of the language in the patent conveying the land: Poverty Flats contends that under a proper construction of the instrument dirt, rock, and caliche were not reserved to the government.

Id. (citation omitted). To conclude that the limitations period has run, according to the court, "the inclusion of dirt, rock, and caliche in the mineral reservation must be so clear that it would have been unreasonable for the plaintiff to believe otherwise." *Id.* at 1079 (citation omitted).

The Fourth Circuit's holding in this case—in which RF&P was seeking only an interpretation of the provisions of the 1938 Indenture—ignores the important distinction the Tenth Circuit drew between a challenge

to the validity of an instrument that is more than twelve years old and a dispute "over the meaning of the language" in such an instrument. *Knapp*, the earlier Tenth Circuit case the Fourth Circuit relied upon, involved a challenge to the validity of a conveyance whose existence had been known to the plaintiff for more than twelve years.[5] Other cases cited by the court of appeals also involved challenges to the validity of the Government's interest, not disputes about the meaning of an instrument creating an interest in the Government.[6]

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[5] In *Knapp*, suit had been filed in 1977. The Government claimed that it had owned the disputed property in fee since 1940. The district court had held that the deeds by which the United States obtained title were a nullity. The Tenth Circuit held, in an unexceptionable application of a statute of limitations, that the action had accrued in 1958, when the plaintiffs learned that the deeds had been recorded and "some of the land they thought they owned appeared to belong to the Federal Government." 636 F.2d at 281. It was in this context that the Tenth Circuit stated that "a cloud on plaintiff's title," *id.* at 282, *see* App. at 7a, and "a reasonable awareness that the Government claims some interest," 636 F.2d at 283, *see* App. at 9a, are sufficient to trigger the statute of limitations.

[6] In addition to *Knapp* and *Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 459 (10th Cir. 1985) (discussed below, note 7), the Fourth Circuit cited *Economic Develop. & Indus. Corp. v. United States*, 720 F.2d 1, 3 (1st Cir. 1983) and *State of Cal. v. Yuba Goldfields, Inc.*, 752 F.2d 393, 397 (9th Cir.), *cert. denied*, 474 U.S. 1005 (1985), for the proposition that "[a]s long as the interest claimed is a 'cloud on title,' or a reasonable claim with a substantial basis," it triggers the statute of limitations. App. at 7a. The Fourth Circuit cited *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984), for the proposition that "[t]he crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid." App. at 7a.

In each case, the plaintiff was challenging the validity of an interest created more than twelve years earlier. In *EDIC*, the plaintiff Commonwealth of Massachusetts itself created an interest in the United States (by enacting a statute under which the Commonwealth's reverter interest in property was allowed to lapse),

In this case, by contrast, the Fourth Circuit has expanded the "some interest" test so that it has no bounds. In any case in which the meaning of the terms of a conveyance to or from the United States is challenged, the Government will necessarily have had "some interest" from the time of the conveyance: The issue is the scope of that interest. Under the Fourth Circuit's ruling, no judicial interpretation of the Government's interest is available under the Quiet Title Act if the conveyance is more than twelve years old.

Under this view, the United States may unilaterally interpret any conveyance after twelve years. In theory, as the Court has recognized, a claimant could act "in hope of inducing the United States to file its own quiet title suit." *Block v. North Dakota*, 461 U.S. 273, 291-92 (1983). As a practical matter, however, the Government can prevent property use by making it difficult to obtain financing for development through public statements, as in this case, that create a cloud on title. It is precisely this type of controversy—which is anything but stale (*see*

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then failed to challenge the validity of this interest within twelve years. 720 F.2d 1.

In *Yuba*, plaintiff California had actual notice that deeds to land had been executed and recorded solely in the name of the United States decades earlier. California claimed an interest because the property was acquired by joint efforts of the United States and California. The Ninth Circuit held the claim time-barred because of California's knowledge of the deeds. 752 F.2d at 396-97.

In *Guam*, the plaintiff was challenging the failure of the United States to include property in a 1950 deed to implement the Organic Act of Guam. The Ninth Circuit held that a quiet title action filed more than twelve years after Guam had the capacity to sue was time-barred; "[w]hatever the merits of Guam's claims, the Government of Guam had notice of the United States' claims and the ability to make the independent judgment to institute suit more than twelve years prior to the filing of this action." 744 F.2d at 701.

None of these cases involves a situation like this one, where the challenge is not to the existence of an interest in the United States, but to its meaning.

Block v. North Dakota, 461 U.S. at 282-84)—that a quiet title action is designed to resolve. Judicial resolution should not be barred through an overly expansive use of the statute of limitations.[7] Where the meaning of an instrument involving real property is presently in dispute, an action under the Quiet Title Act should not be time-barred simply because of the age of the instrument.

II. THE DECISION BELOW PRESUMED THE CORRECTNESS OF THE GOVERNMENT'S INTERPRETATION OF ITS PROPERTY INTEREST AND FAILED TO MAKE ANY INQUIRY INTO THE LEGAL AND FACTUAL BASIS FOR RF&P'S CLAIM

The conclusion of the courts below—that this action was time-barred because the language in the Indenture was clear and unambiguous and put RF&P on notice in 1938—finds no support in real property law, under which the

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[7] The Fourth Circuit, citing *Block*, 461 U.S. at 287, and *Vincent Murphy*, 766 F.2d 449, 452, refused "[t]o hold that the limitations period did not begin to run until conditions had changed and the government reasserted its claim." App. at 9a. This assertion misconstrues the nature of the challenge raised here.

In *Vincent Murphy*, the plaintiff asserted that the Government's expressed intent to enforce comprehensive use restrictions in a quitclaim conveyance of land was a new "claim" by the United States solely because conditions had changed. The court of appeals rejected this argument. It characterized the issue as "just what is the 'claim' of the United States for purposes of § 2409a," 766 F.2d at 451, and refused "[t]o hold that the twelve-year statute of limitations did not begin to run until conditions began changing" because this "would give rise to an interpretation of the term 'claim' . . . which would extend the limitations period indefinitely." *Id.* at 452.

RF&P, unlike the plaintiff in *Vincent Murphy*, does not rely on the argument that because of changed conditions the restrictions of the 1938 Indenture no longer apply. To the contrary, RF&P contends that the provisions of the 1938 Indenture never created the property interest the United States now claims—"restrictive easements . . . intended to protect the parkway," which "only allow the property to be used for railroad purposes."

1938 restriction is, at a minimum, uncertain in duration and scope. Rather than analyzing this law, and the facts surrounding the Indenture, the Fourth Circuit relied on the language alone to hold that the Government's current interpretation of the 1938 restriction cannot be challenged in a quiet title action. The approach followed below would effectively preclude quiet title actions to construe interests in real property created more than twelve years earlier.

The Fourth Circuit, without analysis or citation of any authority, asserted that "[c]ovenants that run with the land are not temporary unless they provide for conditions of termination or expiration." App. at 8a. This assertion is simply incorrect. As was known to the parties to the 1938 Indenture, the general rule is that covenants calling for the maintenance of a railroad are complied with by performance for a period of years unless they specifically provide otherwise.[8]

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[8] A 1920 A.L.R. Annotation, *Period covered by covenant or condition subsequent for maintenance of railroad*, 7 A.L.R. 817, 817-18 (1920), stated:

> The majority of jurisdictions seem to hold that, in the absence of a specified term of years or of express and suitable words showing an intention that performance shall be perpetual, a covenant or condition subsequent for the maintenance of a railroad or its appurtenances is sufficiently complied with by a performance covering a term of years, varying in the cases which have so held from five to sixty years.

Id. at 817-18. *See Willson v. Winchester & P. Ry.*, 99 F. 642, 644-45 (4th Cir. 1900), *overruled on other grounds, Connor v. Real Title Corp.*, 165 F.2d 291 (4th Cir. 1947) (obligation to build and maintain a depot is discharged by its being built, used, and operated for the intended purposes, and there is no right of recovery for its discontinuance); *Jones v. Newport News & M. Valley Co.*, 65 F. 736, 741-42 (6th Cir. 1895) (Taft, J.); *Whalen* v. *Baltimore & O. Ry.*, 112 Md. 187, 76 A. 166 (1910) (where railroad maintained the agreed-upon structures for more than 59 years, the covenant was substantially performed); *Scheller v. Tacoma Ry. & Power*, 108 Wash. 348, 184 P. 344 (1919) and cases discussed therein.

The leading case on this point was decided by the Court more than a century ago. *Texas & P. Ry. v. City of Marshall*, 136 U.S. 393 (1890). A city conveyed land to a railroad company on the condition of "permanent establishment" there of the railroad's terminus, principal offices, and machine shops. The Court held that no injunctive relief was available to the city when the railroad sought to relocate these facilities a mere eight years later. The Court stated:

> [T]he contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car-works and machine-shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words "permanent establishment," as there was no intention at the time of removing or abandoning them. The word "permanent" does not mean forever, or lasting forever, or existing forever.

Id. at 403. Under this authority, as the Justice Department lawyer recognized when the 1938 Indenture was being drafted, a quitclaim without a reverter—like the provision in the Indenture for Area 3—"would effectively transfer all the Government's title to the railroad but it would not . . . bind the land to the restricted purpose . . ." Far from unambiguously imposing a perpetual restriction to railroad use, provisions like those in the Indenture are interpreted in favor of the unfettered use of property.[9]

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[9] Real property law in general disfavors restrictions on the use of property. *See Bain v. Bain*, 234 Va. 260, 360 S.E.2d 849 (1987); *Williams v. Brooks*, 238 Va. 224, 383 S.E.2d 712 (1989); *State-Planters Bank of Commerce & Trusts v. Standard Cary Corp.*, 208 Va. 298, 156 S.E.2d 778 (1967). (In actions under the Quiet Title Act, state law on real property is applied. *See Fulcher v. United States*, 696 F.2d 1073, 1076 (4th Cir. 1982) (citing *Oregon ex rel.*

The court of appeals also ignored another applicable doctrine of real property law which demonstrates that the restriction was hardly clear and unambiguous. In its complaint in this case, RF&P sought a declaration that "[a]s long as Area 3 is used in part for railroad purposes, the United States has no enforceable right against RF&P with respect to Area 3 under the 1938 Indenture."

RF&P's prayer for relief was well-grounded in real property law. The courts have held that a requirement that land be used solely for a particular purpose—even in a condition subsequent in a deed with a reverter—is satisfied by its partial use for that purpose. The leading case in Virginia involves the railroad right-of-way that runs across Area 3. In 1809, a strip of land was conveyed for use for a turnpike. The deed provided that "the said space of ground, one hundred feet wide, shall be forever kept open and unobstructed as a public highway, and for no other purpose whatsoever," and included a reverter to the grantor. In 1854, the eastern half of the strip was sold to a railroad and was used thereafter for a railroad line. The Virginia Supreme Court held that this use did not violate the deed to the turnpike company. It quoted a "well considered" New Jersey case for the proposition that

> "where land is conveyed to be used for a certain purpose, with a clause of forfeiture if it cease to be used for the object specified, it is no ground of forfeiture, if the land is used for other purposes, provided it is also used for the purpose for which it was conveyed."

Alexandria & Washington R.R. Co. v. Chew, 68 Va. (27 Gratt.) 547, 558-59 (1876) (quoting *McKelvay v. Seymour*, 5 Dutcher R. 321).[10]

State Land Board v. Covallis Sand & Gravel Co., 429 U.S. 363, 378 (1977)); *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1387, 1389 n.4 (10th Cir. 1980).)

[10] *See also Lawson v. Georgia S&F Ry.*, 142 Ga. 14, 82 S.E. 233, 235 (1914); *Ritter v. Thompson*, 102 Ark. 442, 144 S.W. 910 (1912).

The courts below made no attempt to apply the pertinent law in dismissing RF&P's quiet title action on statute of limitations grounds.[11] They disregarded RF&P's arguments about the legal merits of its claim and provided no opportunity for RF&P to develop a factual case. In effect, they held that procedural safeguards do not apply when the United States asserts a statute of limitations defense in a quiet title action. The result is not merely to construe the statute of limitations in the Quiet Title Act strictly, as a limited waiver of statutory immunity, but to hold that there is no waiver at all when a title claim implicates the meaning of an interest in real property that is more than twelve years old.

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[11] In addition to the property law doctrines under which restrictions involving railroad use may not simply be construed according to the lay meaning of the language, the opinion below ignored fundamental rules of contract construction. For example, an entire contract should be considered in determining the meaning of any of its parts. *See Virginia Ry. v. Hood*, 152 Va. 254, 146 S.E. 284, 285 (1929); *Hooper v. Musolino*, 234 Va. 558, 364 S.E.2d 207, *cert. denied*, 488 U.S. 823 (1988); *Hampton Rds. Shipping Ass'n v. International Longshoremen's Ass'n*, 597 F. Supp. 709 (E.D. Va.), *aff'd in part and vacated in part*, 746 F.2d 1015 (4th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985). The courts below ignored the provisions of the Indenture dealing with other areas, and particularly those that were restricted to railroad use through the quitclaim of an easement or right-of-way with a reverter (or grant over) should the property be used for any other purpose.

Similarly, the intention of the parties governs in construing covenants, as gathered from the surrounding circumstances, the situation of the parties, the subject matter of the contract, and the object the covenant is designed to accomplish. *See, e.g., Bauer v. Harn*, 223 Va. 31, 286 S.E.2d 192 (1982); *Dart Drug Corp. v. Nicholakos*, 221 Va. 989, 277 S.E.2d 155 (1981). The courts below ignored evidence on these subjects that RF&P was able to adduce without discovery. Among other things, this evidence suggested that the principal objective of the United States was to ensure that Area 3 would be filled from the east so that planting could occur to shield the Mount Vernon Memorial Highway from existing rail operations and the then-planned expansion of Potomac Yard.

III. THE DISMISSAL BY THE COURTS BELOW, WITHOUT ANY OPPORTUNITY FOR DISCOVERY OR AN EVIDENTIARY PROCEEDING, WAS INCONSISTENT WITH PROPER PROCEDURE

In this case, the United States filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) in lieu of an answer and before RF&P had any opportunity for discovery. The only evidence the Government appended to its motion was a copy of the 1938 Indenture.

The district court refused to consider any evidence beyond the provisions of the 1938 Indenture concerning Area 3, stating:

> You only get, or only inquire as to what surrounding tracts had as the burden on them for any reverter, height restriction, and so on, if the language in the grant of this property is ambiguous so that you could go elsewhere to divine the intent of the parties. . . . Absent some ambiguity, what went on in surrounding properties is just irrelevant.

App. at 11a-12a. The court of appeals stated that "the burden of proving subject matter jurisdiction is on the plaintiff"; "the pleadings' allegations [are] mere evidence on the issue." The standard is that "applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists," and "[t]he moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." App. at 5a-6a (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) and *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558, 1559 (9th Cir. 1987)).

The courts below, however, did not apply the standard for summary judgment before dismissing this case. As this Court has held, the summary judgment rule requires

that the nonmoving party be given time for discovery before being required to make a factual showing:

> Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (emphasis added). RF&P was given no opportunity for any discovery, and no evidentiary proceeding of any sort was held by the district court. Instead, both that court and the court of appeals construed the Area 3 restrictions in the 1938 Indenture through a literal reading of the language without regard to applicable law, the rest of the instrument, or pertinent facts. The limited evidence RF&P was able to adduce without discovery was deemed irrelevant by the district court and was essentially ignored by the court of appeals.[12]

This procedure not only failed to comport with the requirements applicable to summary judgment motions, but it disregarded the procedures developed by other circuits and the procedures the Fourth Circuit itself normally follows for the disposition of motions to dismiss under

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[12] At several points in its opinion, the court of appeals intimated that factual findings had been made. For example: "The district court correctly determined that, despite the evidence RF&P presented, no genuine issue of material fact existed since the 1938 indenture gave RF&P actual notice of the government's unambiguously defined interest in restricting the uses of Area 3." App. at 7a-8a. "It is clear, as the district court found, that RF&P knew what the nature of this restriction was in 1938, and that the National Park Service is now asserting that same restriction." App. at 8a-9a. "[T]here is no evidence that the government has ever extinguished or relaxed the use restriction, or abandoned its claim to the continued power of restriction over Area 3." App. at 9a. "Having knowingly covenanted *not* to develop this land, RF&P cannot avoid negotiations as a necessary condition of altering the land use restriction on Area 3." App. at 9a.

Fed. R. Civ. P. 12(b)(1). Under the Fourth Circuit cases, a plaintiff must have an opportunity to develop and present the facts bearing upon its assertion of jurisdiction. *Adams v. Bain*, 697 F.2d at 1219-20. A "potentially dispositive inquiry" is "explicitly foreclose[d] . . . on a 12(b)(1) motion." Instead:

> "where the jurisdictional facts are intertwined with the facts central to the merits of the dispute . . . the entire factual dispute is appropriately resolved only by a proceeding on the merits."

Arthur Young & Co. v. City of Richmond, 895 F.2d 967, 971 (4th Cir. 1990) (quoting *Adams v. Bain*, 697 F.2d at 1219). *Accord Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

Other circuit courts have recognized that "a plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction." *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243 (11th Cir. 1991); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988); *see also* 2A *Moore's Federal Practice* ¶ 12.07[2.1], at 1250 (1991); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1350, at 217 (1990). An order of dismissal must be reversed if the plaintiff has not been permitted to proceed with reasonable discovery and to present evidence. *See Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 597 (2d Cir. 1988); *Majd-Pour v. Georgiana Community Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984).

This procedure is a sound one, which the Court should prescribe in its exercise of supervisory power over the federal judiciary. There is no reason why this procedure should not be used in challenges to jurisdiction under the Quiet Title Act, and the Fourth Circuit provided none.[13] Nor can there be any doubt that in this case the juris-

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[13] RF&P argued this point to the court of appeals both before the decision and in a petition for rehearing.

dictional issue and the merits are bound together. Both involve the meaning of the terms of the 1938 Indenture provisions concerning Area 3. Construing the statute of limitations of the Quiet Title Act strictly should not require the jettisoning of normal procedural safeguards available to a plaintiff.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 17, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-3003

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY;
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., Chief District Judge
(CA-90-1082-A)

Argued: July 8, 1991

Decided: September 19, 1991

Before ERVIN, Chief Judge, and PHILLIPS and
MURNAGHAN, Circuit Judges.

Affirmed by published opinion. Chief Judge Ervin wrote
the opinion, in which Judge Phillips and
Judge Murnaghan joined.

COUNSEL

ARGUED: Howard H. Stahl, STEPTOE & JOHNSON, Washington, D.C., for Appellant. Jeffrey Paul Kehne, Environment & Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. ON BRIEF: John R. Labovitz, David A. Price, Charles F. Monk, Jr., STEPTOE & JOHNSON, Washington, D.C.; Charles A. Hartz, Jr., RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY, Richmond, Virginia, for Appellant. Richard B. Stewart, Assistant Attorney General, Fred C. Wagner, Jacques B. Gelin, Environment & Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee United States; Richard K. A. Becker, HOGAN & HARTSON, McLean, Virginia; William T. Coleman, Donald T. Bliss, Nancy E. McFadden, O'MELVENY & MYERS, Washington, D.C.; Robert L. Polk, Arnold I. Melnick, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellee WMATA.

OPINION

ERVIN, Chief Judge:

Richmond, Fredericksburg and Potomac Railroad Company brought this action under the Quiet Title Act, 28 U.S.C. § 2409a, to quiet title in certain real property in northern Virginia. We find, as did the district court, that the action is barred by the Quiet Title Act's statute of limitations. Therefore, we affirm the district court's dismissal of the action.

I.

In 1938, the United States Secretary of the Interior and Richmond, Fredericksburg and Potomac Railroad Company (RF&P) executed an indenture by means of which various property rights in 17 parcels of land in the vicinity of the Mount Vernon Memorial Highway were

exchanged. Having authorized the construction of this highway in 1928, Congress in 1930 incorporated it into the larger George Washington Memorial Parkway project. Act of May 29, 1930, 46 Stat. 482. The 1930 Act provided that the George Washington Memorial Parkway (the Parkway) was to be administered by what is now the National Park Service. Since 1953 the Parkway has been a part of the National Park System.[1] In its administration of the Parkway, the National Park Service is under a Congressional mandate to conserve the highway's scenic value. 16 U.S.C.A. § 1 (West 1974) (as amended). The National Park Service executes this mandate by planting and landscaping within existing Parkway boundaries and by acquiring scenic easements over adjoining lands.

The 1938 indenture sought to resolve doubts concerning the boundaries between land claimed to be owned by both parties and to settle controversies as to their respective rights, titles, interests and estates. The government wanted to protect the views from the Mount Vernon Memorial Highway, while RF&P sought to clear its title to areas it needed for the expansion of Potomac Yard and other railroad-related facilities. In the indenture, the United States quitclaimed to RF&P a tract, labeled "Area 3," encompassing roughly 40 acres near Four Mile Run just west of the Parkway's original route. The land at issue in this appeal constitutes a portion of Area 3 which underlies a section of RF&P's main line between Washington, D.C. and Richmond, Virginia, and part of RF&P's Potomac Yard.

The quitclaim was not, however, an unconditional transfer of the land. The indenture specifies that the transferred land is subject to a use restriction, which provides that the property is "to be used by [RF&P], its successors and assigns, solely for the construction, mainte-

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[1] *See* Act of Aug. 8, 1953, ch. 384, 67 Stat. 496, codified as amended at 16 U.S.C.A. § 1c(a) (West 1974); *see also* Act of Aug. 18, 1970, 84 Stat. 825, codified at 16 U.S.C.A. § 1a-1 (West 1974).

nance and operation of its main line tracks and ways and a freight yard in connection therewith." This restriction is further restated as a covenant, of which the burden is to run with Area 3 and the benefit is to run with adjacent lands owned by the United States. The covenant states that RF&P "will not use. . . Area 3 for any purpose other than the construction, maintenance and operations by it of its main line railroad tracks and ways and a freight yard in connection therewith."

In 1938, Area 3 was separated from the Parkway by two other parcels of land. When Washington National Airport was created, the segment of the Parkway that paralleled Area 3 was moved to the west to its present location, so that the Parkway now crosses land that was within the bounds of Area 3 at the time of the indenture. In 1975 and 1977, the Washington Metropolitan Transit Authority purchased a narrow strip of Area 3 from RF&P for the construction of a Metrorail line serving stops in northern Virginia. This Metrorail corridor adjoins Parkway land administered by the National Park Service. As a result, the traffic lanes of the Parkway are now separated from the 36-acre portion of Area 3 that remains in RF&P's control only by a narrow strip of Parkway land and by the Metrorail right of way.

Recently, commercial developers in whose enterprises RF&P has an interest have proposed to construct on the land at issue two major projects near the Washington National Airport. Alexandria city officials and citizen groups have opposed these projects, fearing that they will destroy the Parkway area as originally envisioned by Congress and create major traffic congestion, and have made efforts to block the development entirely. As a compromise solution, the National Park Service, while reasserting the effectiveness of the 1938 quitclaim restriction and covenant on Area 3, has offered to negotiate with the developers and RF&P. The National Park Service proposes to drop the railroad use restriction on Area 3 if the developers will

give up their right[2] to build an interchange with the Parkway.

Refusing to negotiate, RF&P filed this action to quiet title in the disputed land in the United States District Court for the Eastern District of Virginia at Alexandria. The named defendants were the United States, the Metropolitan Washington Airports Authority, and the Washington Metropolitan Area Transit Authority. RF&P sought a declaration that the use restriction in the indenture has ceased to be effective or, in the alternative, that the restriction is presently satisfied by RF&P's use of a portion, rather than the entirety, of the property for railroad purposes. The government filed a motion to dismiss on the grounds that subject matter jurisdiction was lacking by reason of the statute of limitations in the Quiet Title Act, 28 U.S.C. § 2409a(g).

The district court, having found that the Section 2409a(g) statute of limitations clearly barred a quiet title action in this case, granted the government's motion to dismiss. RF&P appeals to this court.

II.

When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Id.*; *Trentacosta v. Frontier Pacific Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987). The district court should apply the standard applicable to a

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[2] The government previously traded the right to an interchange with the Parkway to developers in exchange for some wetlands south of Alexandria that were threatened with development.

motion for summary judgment, under which the non-moving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Trentacosta, supra,* 813 F.2d at 1559 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986)). The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Trentacosta, supra,* 813 F.2d at 1558. A district court order dismissing a case on the grounds that the undisputed facts establish a lack of subject matter jurisdiction is a legal determination subject to *de novo* appellate review. *Revene v. Charles County Comm'rs,* 882 F.2d 870, 872 (4th Cir. 1989); *Schultz v. Dept. of the Army,* 886 F.2d 1157, 1159 (9th Cir. 1989).

The Quiet Title Act (the Act) is a limited waiver of the sovereign immunity of the United States, by virtue of which actions may be brought to quiet title to lands in which the United States "claims an interest." 28 U.S.C.A. § 2409a(a) (West 1978). The Act provides, however, that the waiver of immunity expires within twelve years of the date that the claim accrued. The claim accrues on the date that the plaintiff or his predecessor in interest "knew or should have known of the claim of the United States." 28 U.S.C.A. § 2409a(g) (West Supp. 1991). Because the limitations period represents a condition on the waiver of federal sovereign immunity, it is a jurisdictional prerequisite to suit and is to be construed narrowly in favor of the government. *Block v. North Dakota,* 461 U.S. 273, 282-83 (1983). *See, e.g., Fulcher v. United States,* 696 F.2d 1073, 1078 (4th Cir. 1982); *Knapp v. United States,* 626 F.2d 279, 282 (10th Cir. 1980).

A strict construction of the statute of limitations in the Quiet Title Act conforms to Congress's intent in adding the limitations provision to the Act. The Act "grandfathered in" causes of action that accrued during the 12-year period between 1960 and 1972 (when the statute

was enacted), but created no cause of action to quiet title for any title claim that accrued prior to 1960. *See* H.R. Rep. No. 1559, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4547, 4550; *see also Knapp, supra*, 626 F.2d at 282. Summarizing the history of the legislation that became the Quiet Title Act, the Supreme Court noted that Congress added this provision in response to Executive Branch concern with limiting costly litigation over stale land claims. *Block, supra*, 461 U.S. at 282-84.

The merits of a quiet title claim are irrelevant to the operation of the limitations bar. *Deakyne v. Dept. of the Army Corps of Engineers*, 701 F.2d 271, 274 n.6 (3d Cir.), *cert. denied*, 464 U.S. 818 (1983); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984). The interest claimed need not amount to full legal title in the United States. As long as the interest claimed is a "cloud on title," or a reasonable claim with a substantial basis, it constitutes a "claim" for purposes of triggering the twelve-year statute of limitations. *Economic Development & Industrial Corp. v. United States*, 720 F.2d 1, 3 (1st Cir. 1983). *Accord Knapp, supra*, 636 F.2d at 282; *Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449, 452 (10th Cir. 1985); *California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 397 (9th Cir.), *cert. denied*, 474 U.S. 1005 (1985). The crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid. *Government of Guam, supra*, 744 F.2d at 701.7 [*sic*]

RF&P argued before the district court that a proceeding on the merits of the government's claim was nevertheless required because genuine issues of material fact existed concerning (1) the interpretation of the use restriction, and (2) the point in time at which the government's claim accrued. The district court correctly determined that, despite the evidence RF&P presented, no genuine issue of material fact existed since the 1938

indenture gave RF&P actual notice of the government's unambiguously defined interest in restricting the uses of Area 3. *See Vincent Murphy, supra*, 766 F.2d at 450-52 (restrictions in quitclaim deeds from United States to plaintiff provided actual notice of use restrictions); *Hart v. United States*, 585 F.2d 1280, 1283 (5th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979) (deeds conveying land to United States provided actual notice to sellers).

RF&P also contended that the National Park Service's recent reassertion of the Area 3 restrictions is a "new claim" which is broader in scope than the claim asserted in the indenture, and that therefore in 1938 RF&P had no reason to know of this broader claim. Implicit in RF&P's contention is the assertion that the government abandoned its claim prior to reasserting it. *See Schultz v. Dept. of the Army*, 886 F.2d 1157, 1161 (9th Cir. 1989) (stating in dictum that apparent abandonment followed by reassertion constitutes a new claim for limitations purposes). Moreover, RF&P argued that the 1938 indenture could not be said to have put the railroad on notice of the government's claim so long as RF&P could reasonably have doubted the merits of that claim. Citing general property law principles, the overall pattern of exchanges effected by the indenture, and events surrounding the indenture's execution, RF&P maintained that in 1938 it reasonably believed that the use restriction was temporary, terminable in the event that changed conditions no longer justified it.

The use restriction in the 1938 indenture is clear and unambiguous. The United States quitclaimed Area 3 to RF&P on the explicit condition that the land be used solely for railroad purposes. The restriction was expressed as a covenant, the burden of which was to run with the land, *i.e.*, Area 3. Covenants that run with the land are not temporary unless they provide for conditions of termination or expiration. It is clear, as the district court found, that RF&P knew what the nature of this restriction was in 1938, and that the National Park Serv-

ice is now asserting that same restriction. Assuming *arguendo* that RF&P did not know the exact nature of the government's claim in 1938, it still could not escape the limitations bar, for all that is necessary for accrual is "a reasonable awareness that the Government claims *some interest* adverse to the plaintiff's." *Knapp, supra*, 636 F.2d at 283 (citing *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)) (emphasis added).

Moreover, there is no evidence that the government has ever extinguished or relaxed the use restriction, or abandoned its claim to the continued power of restriction over Area 3. Neither the relocation of the Parkway nor the construction of the Metrorail line, which RF&P cited as non conforming uses, violated the restrictions placed on the various land parcels transferred in the 1938 indenture. These uses do not conflict with the Congressional purpose of preserving scenic beauty along the Parkway. In contrast, the commercial use RF&P seeks would interfere with this purpose and certainly justifies the government's reassertion, as to that proposed use, of the right to restriction it has held since 1938. To hold that the limitations period did not begin to run until conditions had changed and the government reasserted its caim would be in effect to extend the limitations period indefinitely, in contravention of Congress's expressed intent. *See Block, supra*, 461 U.S. at 287; *Vincent Murphy, supra*, 766 F.2d at 452.

The operation of the statute of limitations is hardly harsh in this case. It simply means that RF&P cannot get fee simple title to Area 3 for nothing. Having knowingly covenanted *not* to develop this land, RF&P cannot avoid negotiation as a necessary condition of altering the land use restriction on Area 3. The district court's order is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 90-1082-A

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

For the reasons stated from the bench, the court finding that this action is barred by the applicable statute of limitations imposed by 28 U.S.C. § 2409a(g), it is hereby

ORDERED that the motion of the defendant to dismiss is granted, and this action is dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 2nd, 1990

APPENDIX C

[Excerpts from transcript of oral proceedings before district court on November 2, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 90-1082-A

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

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* * * *

[23] THE COURT: The 12-year statute of limitations is, of course, a jurisdictional bar if present when suing the [24] United States. There can be no doubt in my mind that more than 12 years ago clearly and unambiguously the RF & P knew what the restriction on this land was. You only get, or only inquire as to what surrounding tracts had as the burden on them for any reverter, height restriction, and so on, if the language in the grant of this property is ambiguous so that you could go elsewhere to divine the intent of the parties.

This restriction could not in my view be more clear. There is no ambiguity there. The property is to be used solely for the construction, maintenance, and operation of its main line, its RF & P main line railway, and cannot be used, and covenant will not use it for any other

purpose than the construction, maintenance, and operation by and of its main line railroad, track, and so on.

Absent some ambiguity, what went on in surrounding properties is just irrelevant. My view is that this action is barred by this statute, the 12-year statute, and the Government's motion to dismiss is well taken.

For these reasons, the motion to dismiss will be sustained, and the action dismissed for lack of jurisdiction.

MR. ERICKSON: Thank you, Your Honor.

THE COURT: I will prepare the order.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed October 9, 1991

No. 91-3003

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA;
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY;
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendants-Appellees

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Phillips and Judge Murnaghan.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-475

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES, *et al.*

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 17, 1992.

/s/ William H. Rehnquist
WILLIAM H. REHNQUIST
Chief Justice of the
United States

Dated this 3rd day of January, 1992.